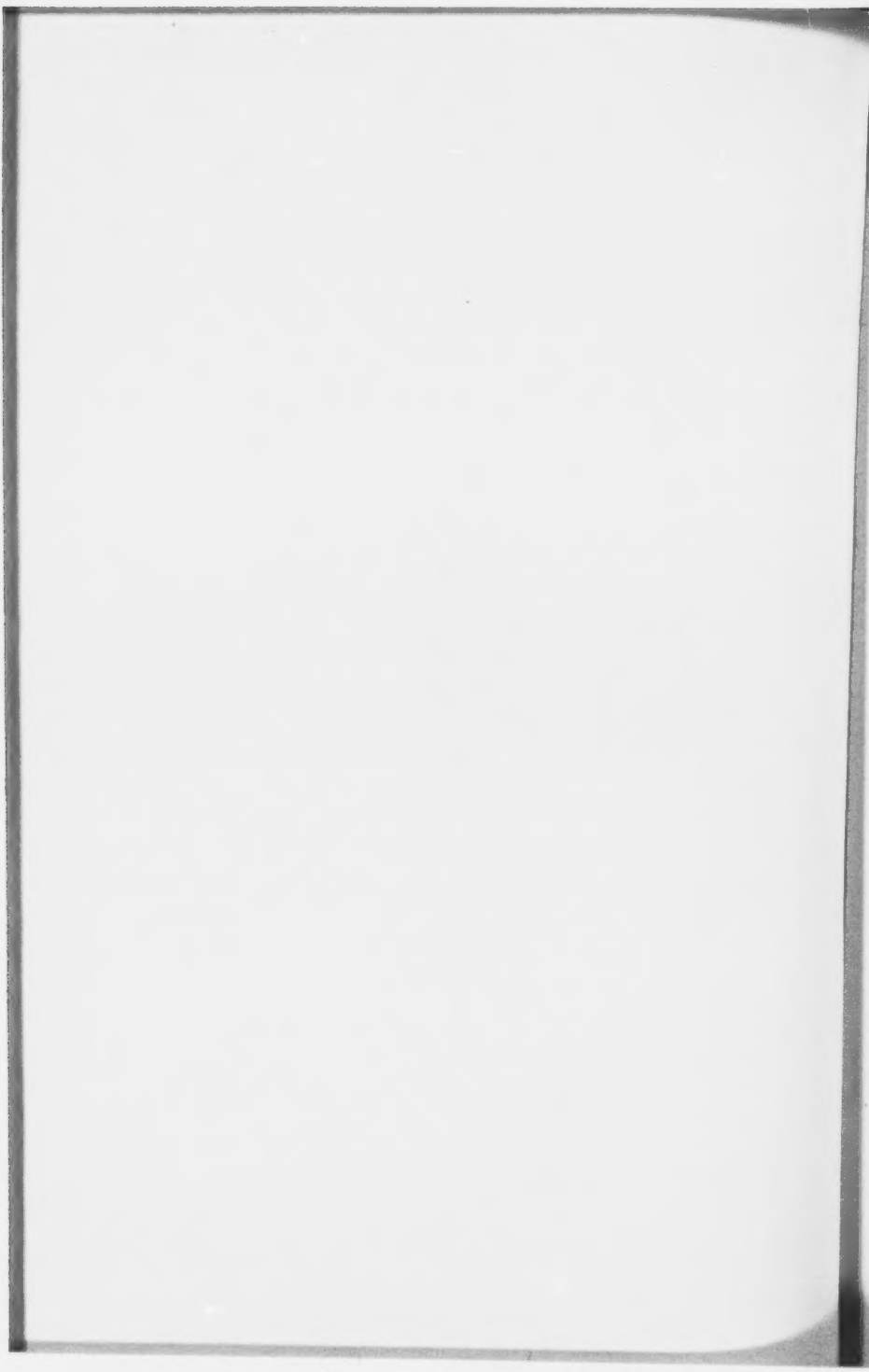


SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1277

CHESTER C. FOSGATE COMPANY, A FLORIDA CORPORATION,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I. The Term "Agricultural Labor" as Used in the Social Security Act Must Be Broadly Construed.

We are not here to argue whether Congress should have included or excluded agricultural labor in enacting the social security laws. Our sympathies and our prejudices may well be laid aside, for Congress has determined policy for us in excluding "agricultural labor", not "farm labor", "farm hands", or some other class of labor, from the provisions of this act. We are solely concerned with defining the term as it may be applied to the set of facts concerning us. In evolving that definition we are not thrown upon our own resources, but are governed by well-known principles of construction, applied indeed in *United States* v.

Turner Turpentine Company, 111 F. (2d) 400, 404 by the Fifth Circuit Court of Appeals to the particular term as used in this particular act, where it is said:

> "It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates."

II. It is Still a Basic Principle of Construction That Effect Should Be Given to the Ordinary Meaning of Words Used by Congress.

In *United States* v. *American Trucking Associations,* 310 U. S. 534, 84 L. Ed. 1345, the principle was thus stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

In *United States* v. *Wurts,* 303 U. S. 414, 82 L. Ed. 932, it was said:

> "Congress may well be supposed to have used language in accordance with the common understanding."

And again in *Deputy* v. *DuPont,* 308 U. S. 488, 84 L. Ed. 416, the proposition was stated as follows:

> "Popular or received import of words furnishes the general rule for the interpretation of public laws."

The only exception to this cardinal principle of construction is delineated in *United States* v. *American Trucking Associations, supra,* wherein it was pointed out that the courts could depart from the plain meaning of words only when such plain meaning has led to absurd, futile, or unreasonable results, "plainly at variance with the policy of the legislation as a whole."

As we shall see, the application of the plain meaning of the term "agricultural labor" to the facts of this case, does not lead to results which are either absurd, futile, or unreasonable, and, in fact, is in plain accord with the policy of the legislation as a whole. It is only by departing from such plain meaning that absurd, futile, or unreasonable results are obtained, which results are "plainly at variance with the policy of the legislation as a whole."

But even if it were to be concluded that the application of the term "agricultural labor" to the services with which we are here concerned constitutes in some instances a departure from the plain meaning of the term, such a departure would be justified in order to avoid absurd, futile, or unreasonable results "plainly at variance with the policy of the legislation as a whole."

We shall save for a later portion of this brief an examination of the definitions and various decisions which reflect the meaning of the term "agricultural labor."

III. The Known Policy of Congress Favors a Broad Construction of the Term.

In *Nardone* v. *United States,* 308 U. S. 338, 84 L. Ed. 307, it was said:

> "Meaning must be given to what Congress has written even if not in explicit language, so as to effectuate the policy which Congress has formulated."

A broader consideration of congressional policy than that which may be embodied in the express act itself is a perti-

nent source for inquiring as to the policy expressed in the act. This has recently been exemplified in *Inland Waterways Corporation* v. *Young,* 309 U. S. 517, 84 L. Ed. 901, where the court said in considering a banking act:

> "In other words, the history and purposes of the statute and the traditional policy of the National Government in utilizing the National Banks as fiscal agencies must give meaning to the silence of the act."

It is also true, as has been recently reiterated in *Haggar* v. *Helvering,* 308 U. S. 389, 84 L. Ed. 340, that "all statutes must be construed in the light of their purpose."

A consideration of the Social Security Act clearly shows that its purpose was not to raise revenue for the operation of government, but rather was to provide a revolving system of benefits, and involved a serious dual consideration of the adequacy of the funds raised to meet the claims for benefits which might have been anticipated.

So, we are concerned, not solely with the difficulty of the collection of the tax in determining the scope of the exemption, but likewise with the difficulty of the commensurate benefits which flow from the fund thus created. The particular title of the act with which we are here concerned is designed to create an unemployment insurance fund so as to relieve the economic ravages of unemployment. The obvious difficulties of providing a system to insure employment in the field of agriculture are numerous.

For example, the court may take judicial notice that the production, harvesting and marketing of fresh citrus fruits is a highly seasonal industry with employment not dependent upon the will of man or upon any system that man has yet been able to devise, but rather upon the condition of the seasons and the condition of the weather within particular seasons. At best, such work must be sporadic. It is reasonable, therefore, to assume that Congress had in mind the

terrific burden this type of labor would constitute upon the fund created by the tax to be levied. It is plain, therefore, that the reasoning which prompted some State courts to so construe the term as not to apply to the mushroom growing industry (*Great Western Mushroom Co.* v. *Industrial Commission*, 82 Pac. (2d) 51, 103 Colo. 39) and to the greenhouse industry (*Park Floral Co.* v. *Industrial Commission*, 91 Pac. (2d) 492, 104 Colo. 350), upon the theory that the labor was not seasonal, can have no application here. Rather when considered in reverse, such reasoning affords judicial support to the conclusion that the type of work here involved represents some of the difficulties which Congress sought to avoid in exempting agricultural labor.

In further considering the policy of Congress, weight must be given to the known policy of Congress to favor agriculture in the interest of sound economic adjustment by benefit payments and by many other means, rather than to burden it with taxes and regulations that might well be made to apply to others. In this connection, we call attention to *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 512, 81 L. Ed. 1245, 1255, where Justice Stone, in considering the constitutionality of the Unemployment Compensation Act of Alabama, which was attacked on the ground that the exemptions were arbitrary, said:

> "The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficial enterprise. This court has often sustained the exemption of charitable institutions, * * * and exemption for the encouragement of agriculture."
>
> *American Sugar Refining Co.* v. *La.*, 179 U. S. 95, 45 L. Ed. 105;
>
> *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 291, 79 L. Ed. 1444.

Nor can we forget that Congress in its treatment of agriculture has never adopted a view so narrow as that resulting either from the administrative interpretation of the regulation under which the tax was collected, or the judicial conclusion upon which judgment was predicated, though Congress has many times dealt with the subject.

It is interesting to note, for example, that the Marketing Agreement Act, 7 U. S. C. A. 608(c), an act administered by the Secretary of Agriculture and designed for the benefit of agriculture, specifically applies by its expressed terms to those engaged in a similar business to the Chester C. Fosgate Company, and indeed the only other occasion on which the Chester C. Fosgate Company's name has appeared in the recorded report of any court was in conjunction with the administration of that act. *Chester C. Fosgate Company* v. *Kirkland,* 19 Fed. Supplement 152.

IV. The Term "Agricultural Labor" is a Wide and Comprehensive Term. It is Defined as:

> "Art or science of cultivating the ground, including harvesting of crops and rearing and management of live stock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use, and their disposal by marketing or otherwise."—Webster's International Dictionary.

No dictionary, no legislative enactment, and no decision of any court has been cited by the appellee, or located by the appellant which supports the limitation upon the term "agricultural labor" sought to be placed thereon either by the regulation which purports to define it, or by the interpretation given the term by the court below.

In other words, we can state as definitely as our research permits that nowhere either in our literature or our body

of judicial decision has the term "agricultural labor" been limited either by the condition of the relationship of the employer to the land on which the product was produced with respect to which the labor was performed, or the relationship of the employer to the product with respect to which the labor was performed. The regulation seeks to place the one condition upon the term and the decision of the court below to superimpose the other condition upon the term.

To support this statement, we feel that it will first pay us to examine carefully the decisions which have attempted to be advanced in refutation of the statement.

The first case upon which the United States most strongly relies is that of *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9th), Cert. deni., 310 U. S. 632. As is indicated by its style, this case arose under the National Labor Relations Act (29 U. S. C. A. 151 et seq.), wherein it is provided that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice, * * * but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

It must be clearly borne in mind that this case dealt only with "the workers in petitioner's packing house," that is, employees similarly engaged to those involved in this suit designated as Items 6 to 10, inclusive, on the employment chart (R. 21) and did not include any consideration whatsoever of those here involved designated as Items 1 to 5, inclusive, on said employment chart (R. 21). As a matter of fact, a distinction is expressly made between the operations of care, cultivation, picking and delivery of the products on the one hand, and the processing, grading, packing and

marketing of the products on the other hand in the language quoted by the court, apparently with approval, from an unreported case of an Oregon Circuit Court.

It is true that in the course of the opinion the Ninth Circuit Court of Appeals fell into the error of confusing the term "agricultural labor" with the term "farm labor," citing a number of cases, none of which support a narrow definition of the term "agricultural labor." These cases all arose under Workmen's Compensation Acts, which we shall subsequently consider, in states where the Workmen's Compensation Act exempted "farm" labor, but had no reference to "agricultural labor." However, we submit that these conclusions constitute only dictum, because the case was basically decided in the light of the purpose of the National Labor Relations Act as applied to the functional nature of and the conditions under which the labor was performed in the packing house of the petitioner involved in the North Whittier Heights case.

We freely concede that the packing house labor, or the class of labor involved in the North Whittier Heights case, falls close to the perimeter of the definition of "agricultural labor" and is probably in that doubtful category where all aids to construction can be utilized. Under the National Labor Relations Act these aids to construction quite properly place the packing house labor beyond the scope of the term, but we nevertheless feel that in the case at bar the aids to construction have the contrary effect, and the field and harvesting labor is clearly within the term without resort to construction. The following portion of the opinion clearly shows the reasoning upon which the decision was predicated:

> "The purpose of the act is clear and we find the act specifically excepting three kinds of employees from its provisions. It would seem profitable to consider whether or not there is a 'common denominator' in

these three exemptions. We think there is. Why is 'any individual employed by his parent or spouse' exempted? Because (not excluding other reasons) in this classification there never would be a great number suffering under the difficulty of negotiating with the actual employer, and there would be no need for collective bargaining and conditions leading to strikes would not obtain. The same holds good as to 'domestic service', and the same holds good as to 'agricultural labor', if the term be not enlarged beyond the usual idea that the term suggests. Enlarge the meaning of any of these terms beyond their common usage, and confusion results."

An analysis of the ordinary definition of the term indicates the distinction. It is clear that even in the narrowest sense, the definition of the term "agriculture" includes harvesting, but only in its broader sense, and then only to a variable extent does it include preparation of the product for market.

Clearly in the light of the purpose of the National Labor Relations Act the Ninth Circuit was justified in applying a narrow definition to the term by excluding from it those employees who would only be included in the broader sense and to a variable extent. Nothing contained therein affects the decision of this Court. We have seen that the broader view of the term as used in the act with which we are concerned has already been designated as the proper rule of construction.

The other decision upon which appellees relied quite strongly is that of *H. Duys & Co.* v. *Tone* (Conn.), 5 Atlantic (2d) 23, which was a case arising under the Connecticut Unemployment Compensation Act decided prior to the decision in the Turner Turpentine Co. case, and which involved only employees of an agency to process, pack and market tobacco, whose services were performed at and beyond point of delivery at the warehouse. As in the North

Whittier Heights case, the court was concerned only with employees whose services admittedly fall only within the broader definition of the term "agricultural labor." A narrower rule of construction was applied than that which was indicated as the proper rule of construction by the 5th C. C. A. The greatest stress was laid on the fact that the Connecticut act was adopted in the light of both the existing federal act and regulation then in effect, and it was concluded that by reason of that fact the existing regulation, which is here under attack, became a part of the Connecticut statute. The result of the decision was to reverse the trial court. Though remaining wedded to its prior decision just discussed, the Connecticut court has since expressed a relaxed view of the question in *American Sumatra Tobacco Corp.* v. *Tone* (Conn.), 15 A. (2d) 80, on the basis of its approval of the decision in the Turner Turpentine Co. case.

Although the Fifth Circuit Court of Appeals had previously held that the term "agricultural labor" must be given a broad meaning in the light of the Social Security Act, because of the confusion between cases defining that term on the one hand and those defining farm labor or some similar term on the other hand, we feel that the importance of this case justifies reviewing once more that question. When the distinction is understood and clearly delineated there is little or no confusion among the authorities, and insofar as it applies to labor performed up to the point where the fruit enters the packing house, there is no confusion whatever in the decisions.

The Workmen's Compensation Acts commonly exempt "farm labor" from their operation, and in 71 C. J. 375, it is said:

> "The question whether or not an injured employee is excluded from a compensation act exempting this

type of employee has been said to be the subject of an irreconcilable conflict, depending somewhat on the varying statutes."

It was possibly to avoid this conflict that the term "agricultural labor" was used. The term "agricultural labor" had been judicially defined to be of a broader and more comprehensive import than the term "farm labor" used in some of the state statutes.

Thus, we find in 71 C. J., published in 1935:

"(c) Agricultural and Farm Work Distinguished.—

"(1) '"Agricultural laborers" (is) a term broader and more comprehensive than "farm laborers".' Davis *v.* Industrial Commission of Utah, 206 P. 267, 269, 59 Utah 607.

(2) 'Some of the acts except "farm laborers", while the Idaho statute excepts "those engaged in agricultural pursuits", the latter phrase being much more comprehensive than the former.' Cook *v.* Massey, 220 P. 1088, 1090, 38 Idaho 264, 35 A. L. R. 200.

(3) 'The terms "farm employee" and "agricultural employee" as used in this State have substantially the same meaning. If there is any difference, the latter expression, which necessarily includes the former, has a broader meaning.' Fleckles *v.* Hille, 149 N. E. 915, 83 Ind. App. 715.

(4) 'There is some discussion * * * upon a supposed distinction between one engaged in agricultural pursuits and one engaged in farm labor. Such a distinction doubtless exists in the sense that one who is engaged in the pursuit of agriculture may not necessarily be a farm laborer, but it is quite evident that every farm laborer is engaged in an agricultural pursuit.' Keefover *v.* Vasey, 199 N. W. 799, 801, 112 Neb. 424, 35 A. L. R. 191."

71 C. J. 376. Note (c).

In *Lowe* v. *North Dakota Workmen's Compensation Bureau* (N. D.), 264 N. W. 837, 107 A. L. R. 973, previously cited by the Fifth Circuit Court of Appeals with approval in the Turner Turpentine Co. case, the court discussed the subject as follows:

> "The plaintiff was employed by the owner of a combine who had contracted to harvest and thresh the crops of a farmer. It is evident the cutting and threshing were all one process because of the machine used. While so working, the plaintiff was injured and now seeks to recover compensation from the workmen's compensation fund.—
>
> "It is admitted that if plaintiff was injured while employed in 'agriculture', as contemplated by the Workmen's Compensation Act, he has no claim against the fund.—
>
> "Section 1 of the Workmen's Compensation Act clearly intends to furnish relief for all workmen engaged in hazardous employments, and were it not for the exemption, those employed in agriculture would be covered. The exception is to be construed strictly; but even with this in mind, it must be clear that the man who plows a field and sows a crop is engaged in agriculture whether he does it for himself, or as an employee of the owner, or on an independent contract. See Sylcord *v.* Horn, 179 Iowa, 936, 162 N. W. 249, 253, 7 A. L. R. 1285."

The following cases were cited by the defendant in the court below to support a narrow definition of the term "agricultural labor", and we presume them to have been the best cases they could locate upon that point:

Maryland Casualty Co. v. *Dobbs,* 70 S. W. (2d) 751, Tex. Civ. App. —;

Boyer, 65 Ind. App. 408, 117 N. E. 507;

White v. *Loades,* 178 App. Div. 236, 164 N. Y. S. 1023;

Vincent v. *Taylor Bros.,* 180 App. Div. 818, 168 N. Y. S. 287;

Noshike v. *Industrial Commission,* 83 Colo. 556, 266 P. 1114;

Charpentier v. *Cumming,* 178 Minn. 519, 227 N. W. 663, 107 A. L. R. 977;

Hart-Parr Co. v. *Barkley,* 231 Fed. 913 (C. C. A. 8th);

Hahn v. *Grimm,* 101 Ind. App. 74, 198 N. E. 93;

Roush v. *Heffelbower,* 225 Mich. 664, 196 N. W. 185;

Jones v. *Industrial Commission,* 55 Utah 489, 187 P. 883, 886;

Sylcord v. *Horn,* 179 Iowa 936, 162 N. W. 249, 252.

Every one of these cases dealt with the term "farm labor", or "farm and agricultural labor", as used in various statutes. In the latter instance the courts, where the combined term has been used, have apparently applied it in the narrower sense, allowing the first word to control the second. An additional case cited by the appellees, *Mundell* v. *Swedlund,* 59 Idaho 29, 80 Pac. (2d) 13, was concerned with the term "agricultural pursuit". However, the decision of the case was predicated upon the fact that the machinery utilized was not harvesting or threshing machinery, but a grinding outfit in the nature of a mill, which changed the form of the product. Idaho falls within the uniform line of cases which gives a broad meaning to the term "agricultural labor". *Cook* v. *Massey,* 220 P. 1088, 38 Idaho 264, 35 A. L. R. 200.

Therefore, we may safely conclude that there is no authority which casts the least doubt upon the correctness of the previous decision of the Fifth Circuit Court of Appeals to the effect that "an examination of the cases * * * convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification must be given an equally comprehensive meaning". *United States* v. *Turner Turpentine Company,* 111 F. (2d) 400, 405.

V. The Definition Proposed by Defendant's Regulation Must Be Rejected.

1. The Regulation Provides a Narrow Definition of the Term to be Defined.

It requires no learned lexicographer to see that the regulation, Section 206(1), Regulations 90, *supra,* fails to meet the requirement of construction set down in the Turner Turpentine Co. case. This regulation superimposes upon otherwise acceptable definitions of the term "agricultural labor", a concept foreign to the term as used in the Act, that is, a classification based on the relationship of the employer to the land, rather than upon a classification of "service" as contemplated by the act.

Had Congress intended the exemption to be determined according to the status of the employer rather than the nature of the service, it does not seem it would have used the language, "The term employment means any service * * * except * * * agricultural labor" (42 U. S. C. A. 1107) after levying the tax only "with respect to employment" (42 U. S. C. A. 1101).

If this purely artificial concept as applied to the term "agricultural labor" had been intended by Congress, simple language to express such intent would doubtless have suggested itself in the drafting of the Act. Certainly the language used does not express this concept, and even more certainly the imposition of this concept greatly narrows the scope of the term, not only in its broader meaning, but in its ordinary narrower meaning.

2. Classification Based on Employer's Relationship to Land Leads to Absurd Results and Distinctions Never Contemplated by Congress.

If Congress had intended to distinguish the exemption on the basis of whether or not the employer was a producer

who limited his operations to his own production, it would not have used the language of the regulation we are considering. It was concerned with defining a farmer under the Bankruptcy Act and used far different criteria.

For instance, suppose the Ford Motor Company owned a thousand acres formerly used as a testing ground. On abandoning its use for that purpose, the board of directors decided the economical thing indicated by the fertility of the many small farms in the area was to plant corn on that plot to be later used in manufacturing a plastic. The company owning the land, the employees engaged in producing and harvesting the corn would be "agricultural labor" within the meaning of the regulation and therefore exempt from the burdens and benefits of the act.

Meanwhile, ten farmers in the vicinity were each eking out a marginal existence on a contiguous fifty-acre tract. Seeing the success of Ford's large-scale operation they formed a caretaking company which accumulated necessary expensive equipment and took care under contract of the production, harvesting and marketing for the ten farmers who were themselves employed by the caretaking organization. These farmers, under the regulation, would not be "agricultural labor" and would therefore be subjected to the burdens of the act.

Did Congress intend this distinction under the 1935 Act when it used the term "agricultural labor"? Yet this is the essence of the problem confronting us.

If we went into a grove and saw two negro field hands picking adjoining rows of citrus with identical equipment in an identical manner, we couldn't say whether either, or both, was performing agricultural labor under the regulation. The services of a surveyor, an abstractor and a lawyer would be required to make the determination. And then a long litigation might have to follow before a final conclusion could be reached so as to settle the land line, the

title of the owner, the connection between the owner and the field hand's employer and the connection between the field hand and his employer. When all that is finished it might be concluded under the regulation that one negro was performing agricultural labor, whereas the other was not, even though both were performing the identical function for identical wages to be paid by an identical employer.

In other words, it seems plain that the act seeks to exempt the service rendered, or to classify employees according to the nature of the service rendered by them. The regulation on the other hand seeks to predicate the determination upon the nature of the employer's business rather than upon the nature of the service rendered the employer. Even if this concept were permissible the regulation nevertheless fails to make any proper classification of the employer, because under the regulation many employers who are distinctly not farmers would enjoy the exemption, whereas, many other employers who are basically farmers would not enjoy the exemption. So, even if the term is treated from the viewpoint of the classification of the employer rather than the employee, the regulation is still invalid, because it still draws an arbitrary classification plainly beyond the scope of congressional intent.

3. The Regulation Operates to Favor the Large as Against the Small Producer.

Only the largest producers of citrus can afford to directly employ their own grove workers for the reason that only they can afford to own the necessary equipment. And only a handful of the very largest can afford to employ their harvesting and packing workers, for the same reason.

These under the regulation do not have the burden of paying the tax or the burden of keeping the cumbersome records required. Yet this burden is thrust upon the small

producer who can least afford it. Is this result within the purview of the known policy of Congress?

It is now recognized by all competent economic authorities that the incidence of cost with respect to the packing of fresh fruits and vegetables, or other highly perishable commodities prior to their reaching a terminal market for distribution for consumption inevitably falls upon the producer as much so in the instance where he performs such services himself as where they are performed for him by another, either under contract or by purchase, the market being fixed at the centers of consumption without respect to such cost. This is so axiomatic as not to require a voluminous discussion or citations of authority. We are confident that there is no competent authority which refutes the statement.

Indeed it is borne out and exemplified in the reports of both the Senate and House Committees which dealt with the Social Security Act Amendments of 1939, wherein it is said:

> "Your Committee believes that greater exactness should be given to the exception (agricultural labor) and that it should be broadened to include as "agricultural labor" certain services not at present exempt (under the administration of the existing law), as such services are an integral part of farming activities. In the case of many such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones."

(Committee on Ways and Means, H. Rep. No. 728, 76th Congress, First Session, Page 51; Committee on Finance, S. Rep. No. 793, 76th Congress, First Session, Page 61.)

It is plain from the provisions of the bill itself that Congress did not intend to discriminate so as to favor the large producer who could afford to integrate under his own ownership and management all of the operations essential to getting his fruit to market, as against the small producer who could not.

4. No Dictionary or Judicial Decision Supports the Regulation.

We have already examined in some detail the decisions treating of the term, and simply repeat again for the sake of the full consideration of the particular regulation being here discussed that no support for it can be found in any dictionary or in any court decision which justifies the concept of the employer's relationship to the land on which the products with respect to which services were rendered were produced as a proper condition of the term "agricultural labor."

5. The Administrative Practice in Defining Terms is Not Binding Upon the Courts.

We submit that even if the regulation itself were valid, it is nevertheless ambiguous and does not support the interpretation given to it as applied to all of the classes of labor with which we are concerned.

It should be noted that the regulation is divided into two paragraphs separately set out and designated respectively (a) and (b).

The first portion of the regulation recognizes as agricultural labor services performed on a farm without respect to the nature of the employer.

The second section of the regulation then exempts the "packing, packaging, transportation or marketing" of articles from materials produced on a farm, and goes on to

provide that such services, however, would not constitute agricultural labor, unless performed by an employee of the owner or tenant of the farm on which the materials were produced, and unless such processing, packing, packaging, transportation or marketing were carried on as an incident to ordinary farming operations. We submit that a proper interpretation of the regulation would limit the application of the condition regarding the status of the employer solely to the class of service discussed in sub-paragraph (b), exclusive of those on a farm, described in sub-paragraph (a).

Indeed, in considering the regulation in the light of the accepted definitions of agricultural labor, it is more than likely that the regulation was originally intended to have this effect. The services described in sub-paragraph (a) of the regulation are within the narrowest purview of the definition of agricultural labor, whereas, as we have previously noted, the services described in sub-paragraph (b) containing the objectionable condition are only within the scope of the term in its broader sense and only to a variable degree, and the condition was doubtless designed to limit the variability of the degree to which such services would be considered within the term for administrative purposes.

It is unquestionably the law that even where an administrative regulation might otherwise deserve some weight, an ambiguous regulation is without persuasive force in determining the true construction of a Federal law. *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 84 L. Ed. 20.

But regardless of whether the regulation is doubtful or not, it still has only a limited effect upon the problem of construction, as was pointed out in the last cited case:

> "Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict

with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law.

"But Courts are not bound to accept the administrative construction of a statute, regardless of consequences even when disclosed in the form of rulings * * * We should be free to reject the practice when it conflicts with our own decisions."

VI. The Trial Court's Definition Making the Incident of Ownership Determine the Character of the Work is Without Support, and Has Been Judicially Disavowed.

No dictionary, no judicial decision, no statute, no regulation and no contention of either party supports the trial court's definition of the term "agricultural labor." We have been able to locate only one case wherein the concept has ever been discussed, and that case refutes it as a valid concept of the term. *Melendez* v. *Johns* (Ariz.), 76 Pac. (2d) 1163.

In view of this great negation, it may pay us to examine briefly into the reasoning and background from which the trial court's decision sprung with sudden surprise.

The trial court was quick to recognize the erroneous nature of the regulation which the Government sought to support, and held such regulation invalid (R. 68-71) and sought to follow the decision of the Fifth Circuit Court of Appeals in the Turner Turpentine Co. case (R. 66).

However, in the course of the argument the Court's attention was attracted to the following language contained in the amended act defining "agricultural labor" and placing a limitation upon the definition, as follows:

> "The provisions of this paragraph shall not be deemed to be applicable with respect to services performed * * * in connection with any agricultural or horti-

cultural commodity after its delivery to a terminal market for distribution for consumption." 26 U. S. C. A. 1607(1) (4).

The court then concluded that as soon as the fruit was sold by the producer, regardless of to whom it was sold, it had reached a "terminal market" within the meaning of the statutory limitation upon the statutory definition. Apparently overlooking the fact that this condition was limited to the class of labor described in sub-section (4) of the definition, the court went on to apply the criterion not only to the class of labor described in paragraph (1), to which the condition thus erroneously interpreted had no application under any circumstances.

However, it is obvious from the record that the plaintiff does not operate a "terminal market for distribution for consumption", but only grows and buys fruit on the tree for the purpose of harvesting, packing and delivering it to "a terminal market for distribution for consumption." (R. 33-36, 40).

Citrus fruit to be shipped in Florida must be graded and packed in accordance with prescribed standards (Chapter 16854, Laws of Florida, Acts of 1935, Sections 10-13, which are not set forth because the point is too collateral to justify the printing involved). This is true not only because of the laws of Florida, but because of the existence of a Federal grade and size marketing agreement affecting the commodity (7 U. S. C. A. 608(c)). In other words, the functions performed by the laborers are part of a continuing operation from the planting of the tree to the delivery of the fruit to market, and an absolutely necessary condition to the delivery of the fruit to market. It is the same type of continuing operation referred to in *American Sumatra Tobacco Corp.* v. *Tone* (Conn.), 15 A. (2d) 80.

It seems that this condition upon the definition of agri-

cultural labor on its face cannot be applied to the plaintiff here. It is quite plainly designed to limit the definition of the term to labor performed in the area where the fruit is produced, essential to the procedure of getting it to the place where it is consumed. None of the fruit handled by the plaintiff is consumed in Florida, much less in the area where produced, other than possibly a few oranges which the laborers may themselves eat during the process of packing. Indeed, as we have seen, those charged with administration of the Act have never given the language this construction, and all of this type of labor has been recognized as exempt since January 1, 1940, under the amendment.

However, since the language was misconstrued by the trial court, it might be important to consider congressional intent, and, consequently, we call attention to some of the remarks of Congressman Buck, the member of the House Ways and Means Committee, which reported the amended act favorably, and who directed its passage through the House (Vol. 84, Part 6, Congressional Record, 6710 et seq., 6862 et seq.).

We note these remarks not with the view that they are binding declarations of congressional intent, but because they fortify what is otherwise clear from the language of the Act and other legitimate aids to construction.

It is definitely proper in construing the statute to have recourse to the statements made by those in charge of the measure during its consideration.

United States v. *Great Northern R. Co.*, 287 U. S. 14;
Wright v. *Mountain Trust Bank*, 300 U. S. 440.

In weighing these collateral aids to construction, the limitation should, of course, be borne in mind that congressional debates may not be used to change or vary the meaning of the words of a statute, but they may be considered

as reflecting light upon its general purpose, and the evils which it sought to remedy.

Humphrey v. *U. S.*, 295 U. S. 602.

With regard to the concept superimposed by the trial court upon the term "agricultural labor", Mr. Buck, in advancing the passage of the Act through the House of Representatives, said:

> "These curious distinctions produce inequities among people operating in the same commodities in the same localities, and certainly this is an injustice. Now assuming there is merit to what I said about the reason for the exemption of agricultural labor, until such time as both employers and employees have been educated to the point where they will want to be included, * * * then we ought to have this clarifying amendment, this defining amendment which is based on the theory that it is not by whom a man is employed, but the nature of the work he is doing that constitutes the agricultural labor."

Earlier in his remarks, Mr. Buck covered some of the other problems which are here involved, as follows:

> "Let me call attention to some of the other rulings. In some cases the rulings have worked to the advantage of farmers who have large acreage. I stated a few minutes ago that I am a farmer. I have a fairly large acreage, and on it I have a packing plant where I can clean, wash, and pack my own fruit.
>
> "That labor is exempt. If 10 or 20 of my neighbors do the same thing in the same way, if they get together and build a cooperative packing shed on the railroad and wash their apples or their pears, and pack their fruit and use the same type of labor under the same circumstances, they are now taxed under the rulings of the Bureau of Internal Revenue, because the work is done off of a farm. Where is the justice in that, in making the small producer suffer?

"Let me add that the Pure Food and Drugs Act of the United States and many State laws require rigid inspection of agricultural commodities, and in the case of apples and pears require that they be washed before they can be shipped in interstate commerce. The average farmer is in no position to handle this work by himself on his farm. He must cooperate with his neighbors in a common packing plant where his fruit can be washed, his beans graded and cleaned, and so on. All these processes are a part of the preparation of the farm crop for market, and it has been unfair and inequitable for the Bureau of Internal Revenue to make rulings which tend to restrict all of these operations to a given farm. Their rulings have worked to the advantage of those who have large acreages on which they can carry through a complete agricultural operation from producing a crop to delivering for transportation to market. It might be very fairly said the present amendment is intended not merely to state clearly what Congress considers are agricultural operations but to remove the inequities that now exist." Id, Page 6864-6865.

It seems quite clear that Congress never intended to classify "agricultural labor" according to the status of the employer.

To conclude the discussion of the imposition of the artificial concept of the relationship of the employer to the product as a condition for determining what is agricultural labor, we quote from *Melendez* v. *Johns, supra:*

"The other point made by petitioner, if we understand him aright, is that because Johns and Brand were buyers and shippers of lettuce Melendez and his coemployees engaged in harvesting the lettuce were not agricultural workers, but industrial workers. We get this thought from the petitioner's fourth proposition of law, which is: 'Harvesting of crops when it is not a part of the ordinary mixed duties of a farm hand, but is a matter of skilled occupation pursued by a person

not engaged as a farm hand, is industrial and not agricultural labor.'

"Whether this states a correct proposition of law we do not undertake to determine. It has no application here. Under the evidence all the employees were engaged in the same business; that of harvesting a lettuce crop. The mere statement of what they were doing shows it was not skilled work, but common labor; also, that there were no mixed duties. The Industrial Commission's findings are that such work was agricultural and that the employers had not elected to be subject to the Compensation Law. If the commission had found the employers were within the provisions of the Act, it would have been contrary to both the facts and the law. In Hight *vs.* Industrial Commission, supra, one of the questions was whether a cow hand whose task was to look after cattle was engaged in agricultural work, and we held that he was. We quoted from three standard works the definition of 'agriculture', and all of them agreed that it includes; one says 'harvesting of crops', another 'removing the crops', and the other, 'gathering in the crops.' In other words, the harvesting of a crop is just as essentially agricultural as is the planting and cultivating of it to maturity.

"Nor do we think the incident of ownership changes the character of the work of harvesting from agricultural to industrial or commercial work. Where lettuce is grown as a commercial article, as in Arizona, it must be cut, picked, and carted for the market, and whether by the grower or the purchaser the work is agricultural. It does not cease to be agricultural on change of ownership, as where the grower before it is harvested sells the crop to a third person who harvests and markets it." 76 P. (2d) 1167.

VII. Whatever Doubt May Have Existed About the Meaning of the Term as Originally Used Has Been Settled by the Amended Act.

1. The Rule of Construction.

This Fifth Circuit Court of Appeals has previously held that the language of the amended act must be taken as explanatory of the original intent in *United States* v. *Turner Turpentine Company*, 111 F. (2d) 400, 404, as follows:

> "As to the 1939 Amendment of the Social Security Act, we agree with appellees that it is to be regarded as interpretive and explanatory of the term as it was used in the original act, and that it is itself a binding and final congressional declaration of what was meant by the term 'agricultural labor' as there used."

That utterance is not a novel rule of construction, but one which has always prevailed from the earliest times.

> *463: "Several acts in pari materia, and relating to the same subject, are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule was declared in the cases of Rex *v.* Loxdall, and the Earl of Ailesbury *v.* Patterson; and the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and *464 harmonious in its several parts and provisions. Vol. I, Kent's Comm., *463, *464.
>
> "If in a subsequent clause of the same act provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense

of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.

Alexander *v.* The Mayor, 5 Cr. 8, Marshall, C. J.

"The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law, it is entitled to great weight."

Per Ruger, Ch. J., People ex rel. West Chester Fire Insurance Co. *v.* Davenport, 91 N. Y. 574.

U. S. *v.* Coulby, 251 Fed. 982-985. Affirmed 258 Fed. 27.

2. The Legislative History.

The defendant below, in an effort to avoid the full import of this rule of construction, sought solace from a technical treatment of isolated passages in the various committee reports. The substance of their argument depends upon a treatment of the word "law" as contained in congressional reports as meaning only the law as it truly existed, rather than the law as it was being administered. When we give the latter meaning to the congressional treatment of the status quo at the time of amendment, all of the doubts which the defendants below seek to cast upon what is otherwise clear are dispelled.

The Fifth Circuit Court of Appeals appears to have been misled by Social Security Act Amendments of 1939 (H. Rep. 1461, 76th Congress, First Session), providing as follows:

"The managers on the part of the House desire to state that the changes made by this bill with respect to agricultural labor do not take effect until January 1, 1940, and therefore have no effect whatsoever on any

litigation now in the courts with respect to what constitutes agricultural labor under present law" (pp. 20-21).

It is interesting to speculate upon the purpose of that language. Its purpose becomes clearer when we refer to the congressional debates which preceded it and which followed the separate Committee Reports of the House and Senate.

By referring to the Congressional Record, Vol. 84, Part 6, Pages 6864, 6865, we find the following passage in the debates beginning with the statements of Mr. Buck, who was the floor leader of the Committee of the House which steered the 1939 Amendments to passage:

> "The exemption contained in the original act is justified and should be continued. The clarifying paragraphs that the Ways and Means Committee has put into this bill are merely for the purpose of interpreting the original decision of Congress that agricultural labor should be exempt. These paragraphs are based on the theory that what is agricultural labor is determined by the nature of the work and not by whom the man is employed. Agricultural labor starts with the planting of a crop. It ends when that crop has been delivered to market or to a carrier for transportation to market, and all the intervening steps should be regarded as in the nature of agricultural labor.
>
> "Mr. Woodruff of Michigan: Will the gentleman yield?
>
> Mr. Buck: I yield to the gentleman from Michigan.
>
> Mr. Woodruff of Michigan: May I direct attention to the bottom of page 51?
>
> "May I offer a tribute to the work of the gentleman from California in connection with clearing up a misunderstanding that seems to have existed in the Treasury Department in its interpretation of the will of Congress as outlined in the Social Security Act.
>
> "Mr. Buck: I thank the gentleman.

Mr. Woodruff of Michigan: In that connection I will go into the matter further when the gentleman is ready to yield.

Mr. Buck: The gentleman may propound his question and perhaps I can answer it as I proceed.

Mr. Woodruff of Michigan: I find at the bottom of page 51 the following sentence:

"Services performed on a farm in connection with the raising, feeding, and management of fur-bearing animals, such as foxes, not now exempted, will be exempt under paragraph I.

"At the bottom of page 53 I find the following:

"The term, for example, includes fur-bearing animal farms. Under the present law, services performed in connection with the operation of such farms constitute covered employment.

"As a matter of fact, is it not true that that is simply an interpretation of the law by the Treasury Department and is not covered in the law itself?

"Mr. Buck: I think the gentleman is correct in his conclusions. The law clearly exempts 'agricultural labor'. Our difficulty has been to make the Treasury understand what 'agricultural labor' is. I would like to develop that in connection with two or three other rulings the Treasury Department has made, if the gentleman does not mind." * * *

"Mr. Hawks: Mr. Chairman, will the gentleman yield?

Mr. Buck: I yield to the gentleman from Wisconsin.

Mr. Hawks: In connection with the sentences to which the gentleman from Michigan called attention, I wonder if the fur farmers who have been paying these taxes under the language used in the report will receive any repayment?

Mr. Buck: I cannot tell the gentleman that. I will say this much, that in the opinion of those of us who helped to draw this amendment these various services which form an integral part of agriculture were in-

tended to be covered by Congress in its original enactment; but, frankly, I cannot tell the gentleman what the situation would be in regard to the problem there.

Mr. Hawks: It is not quite fair that they should have been taxed purely under a regulation issued by the Department.

Mr. Buck: I take it that they have their recourse to the courts under those circumstances; there is no question about that." Id. 6864, 6865.

It is plain from the foregoing that the only fear of Congress with reference to the amendments was that they might be given the effect which the Fifth Circuit Court of Appeals assigned to them because of some of the loose language contained in the separate House and Senate Reports (H. Rep. No. 728, 76th Congress, First Session; Senate Report No. 734, 76th Congress, First Session) wherein references to "existing law" is sought to be construed as referring to the existing congressional intent. As a matter of fact, it is plain that Congress only intended in using the term "existing law", to refer to the administration of the existing statute.

The sequence of events then is: first, the Congressional Committee loosely used the term "existing law"; second, the Committee representative upon being questioned assured the House that such language was not intended to be so construed, and that the amendment was plainly clarifying of the original intent; and third, in order to cure the objection, the Joint Committee made it plain that the amendment and the circumstances surrounding its adoption could not be used to cure the results of administrative error under the law as it previously existed.

Likewise, the Senate and House Reports in many places indicate an intent to merely clarify rather than change the previous intent. For example:

"Paragraph (I) (Section 1426(b)) continues the exception of agricultural labor, but a new subsection (L) defines the term for the purpose of the exclusion." (H. Rep. 60, 73, S. Rep. 74, 85.)

It seems from an examination of the reports that there is nothing contained in them which indicates any intent to have enacted a new or different meaning of the term "agricultural labor" as it might have been properly construed prior to the amendment.

Respectfully submitted,

CHARLES O. ANDREWS, JR.,
302 Florida Bank Building,
Orlando, Florida.

Of Counsel:
JOHN S. LAVIN,
302 Florida Bank Building,
Orlando, Florida.